

## CLIENT ALERT

### Trade Secret Misappropriation and More: ITC Bars Importation of a Foreign Producer's Stainless Steel Products for 16 Years

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Recently, the U.S. International Trade Commission (ITC) confirmed a decision to enter default judgment against India-based Viraj Profiles, a stainless-steel producer, for stealing an American company's trade secrets. The [ITC's ruling](#) bars the entry of certain Viraj's products into the U.S. for a period of 16 years. This severe penalty comes in response, not only to Viraj's misappropriation of trade secrets, but also to its subsequent wholesale destruction of evidence. The Commission's decision again exemplifies how the ITC can be an effective forum to litigate international trade secret misappropriation.

#### Background

The victim of Viraj's alleged misconduct was American-based Valbruna Slater Stainless. Valbruna is another manufacturer of stainless-steel products. Valbruna alleged that, in August 2006, Viraj took its trade secrets by inducing a former Valbruna employee to steal Valbruna's operating practices and its customer lists, and turn them over to Viraj. The stolen information included Valbruna's processes and ingredients for making stainless steel, as well as its customer databases.

Before the ITC even addressed the matter, Valbruna's allegations found support in foreign courts. In 2009 the former employee was convicted of theft by an Italian court for stealing Valbruna's customer lists and production processes. And in 2014, an Italian court convicted Viraj's general manager of the same crime.

In September 2014, Valbruna requested the ITC to investigate Viraj's wrongdoing. Valbruna's complaint alleged violations of the Tariff Act's Section 337—a law that permits the Commission to bar entry into the U.S. any "articles" that are produced through "[u]nfair methods of competition" and which threaten "to destroy or substantially injure an industry in the U.S." 19 U.S.C. § 1337. The Federal Circuit has previously interpreted the ITC's power over "unfair methods of competition" to include trade secret misappropriation.

Once the ITC proceeding commenced, Viraj quickened its own fate. Of course, the filing of the Valbruna complaint imposed a legal duty on Viraj to preserve—and not to alter—relevant evidence, including its computers and USB devices. Counsel advised Viraj of this duty. During the investigation's discovery period, however, Viraj failed to produce pertinent USB devices and files associated with the company's computers. In response to these shortcomings, Administrative Law Judge Essex ordered forensic inspection of several Viraj employee computers and electronic devices. The inspection revealed that Viraj destroyed highly pertinent evidence; it showed that files mirroring Valbruna's claimed trade secrets—its production processes and customer lists—were once on Viraj's computers and devices, but shortly after receiving the complaint, Viraj overwrote and erased the files.

Finding that Viraj acted deliberately, and with the intent to destroy implicating evidence, the ALJ issued an Initial Determination in December 2015 granting Valbruna's motion for default judgment against Viraj for spoliation of evidence (the "Spoliation ID").

## The ITC's Decision

Last week, the ITC confirmed its earlier notice to affirm the ALJ's Spoliation ID. Applying both ITC and federal case law, the Commission explained that the default order was proper. The ALJ was correct to presume Viraj's trade secret violations after the company acted to destroy evidence, the ITC explained. A lesser sanction would have been inadequate to protect Valbruna from possible further misconduct by Viraj during the remainder of the proceedings. Furthermore, the default was necessary to deter the spoliation of evidence in future cases and to protect the integrity of the adjudicatory process.

After affirming the validity of the ALJ's Spoliation ID, the Commission moved to the issue of remedy. Section 337(d)(1) of the Tariff Act provides that, "[i]f the Commission determines...that there is a violation of this section, it shall direct that the articles concerned...be excluded from entry into the U.S..." 19 U.S.C. §1337(d). By law, the Commission retains discretion in determining the scope of an exclusion remedy.

After considering numerous comments from the parties, members of Congress, and various non-parties, the Commission determined that the issuance of a limited exclusion order and cease-and-desist orders against Viraj's tainted steel products would not harm the public interest. The ITC thereafter defined the contours of its exclusion broadly, barring from entry into the U.S. all of Viraj's "stainless steel products manufactured using any of the trade secrets identified in Valbruna's complaint." It then set the time period for the exclusion: 16.7 years. In doing so, the Commission relied on law holding that an exclusion's duration should equal the time it would have taken the alleged violator to have developed the trade secrets on its own. Here, the record showed that it took Valbruna a little over 16 years to develop its production processes and its customer lists. The Commission found it reasonable to presume that it would have taken Viraj the same amount of time.

Unless set aside by the president through the U.S. Trade Representative – which seems highly unlikely – the Commission's exclusion and cease and desist orders prohibiting importation for more than 16 years will become final after 60 days.

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The case demonstrates how the ITC can be an effective forum for litigating international trade secret misappropriation. Against foreign defendants who lack a U.S. presence, the ITC is a useful forum because it retains *in rem* jurisdiction over products imported into the U.S. The Commission's power to "keep goods out" extends to all foreign defendants, even those who can otherwise avoid personal jurisdiction (and by extension, damages liability) in U.S. courts. (For other articles on the ITC's power over trade secret theft, see [this article](#) and [this article](#)).

The Spoliation ID and 16.7-year exclusion period against Viraj convey a forceful message of the ITC's power to render trade-secret justice—a power that may become even more effective given recent events. This spring, President Obama [signed the Defend Trade Secrets Act of 2016 into law](#). The new law creates a federal civil cause of action for trade secret misappropriation and will have the likely effect of harmonizing trade-secret law across the U.S. Whether or not the ITC's jurisdiction will be expanded to cover the DTSA, which currently gives federal district court original jurisdiction, will be a topic of further discussion in the months ahead.

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